

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

In the present case, OWCP accepted that appellant sustained a lumbar strain on April 30, 1991 and accepted neuritis in a second injury on May 1, 1991 resulting from an electric shock. Appellant began receiving compensation for wage loss. On August 9, 1995 OWCP accepted major depressive episode.

OWCP periodically required appellant to submit information on Forms CA-1032, regarding any employment activity, dependents, receipt of other benefits and other relevant information. The record indicates that appellant submitted Form CA-1032's signed on the following dates: June 22, 1993, June 28, 1994, August 2, 1995, June 6, 1996, July 17, 1998, August 30, 2000, August 16, 2001, August 3, 2002, August 12, 2003, July 24, 2004, September 21, 2005, August 2, 2006, July 13, 2007 and February 20, 2009. Appellant did not report any employment activity with respect to a charter boat business on any of the forms.

In an investigative report dated March 23, 2009 from the Department of Labor's Office of the Inspector General (OIG), investigator's stated that appellant had operated a commercial charter boat business since the 1990's. According to the report, on July 30, 2008 the U.S. District Court accepted a guilty plea from him for violation of 18 U.S.C. § 1920 (False Statement to Obtain Federal Employee's Compensation). The report noted that OWCP had asked appellant about his charter boat activities in 1993, but he falsely reported no income from the activity. The documentation provided including evidence from the Maryland Department of Natural Resources regarding the bookings recorded under his charter license. The initial booking recorded was May 1, 1993, with bookings each year except 1995 and 2003. The last booking was December 18, 2005. According to the investigative report, appellant advertised his services and charged fees for half day and full day fishing trips.

The evidence accompanying the investigative report included a report of interview with appellant on July 30, 2007. The interview report stated that appellant admitted he "lied" on OWCP questionnaires for several years. According to appellant, in 2006 he only fished two or three times and had not fished since "the early summer" of 2006, selling his boat in February or March 2007. There is a handwritten document from him regarding earnings from 1993 to 2005. Appellant noted earnings of approximately \$6,000.00 in 1998, 2001 and 2002. He reported "no fishing" for 1995, 1999, 2003 and 2004.

Additional evidence included a plea agreement signed by appellant on June 12, 2008. The plea agreement was dated June 6, 2008 and provided that he agreed to waive indictment and plead guilty to one count information charging him with making false statement to obtain compensation, in violation of 18 U.S.C. § 1920. Appellant agreed to the entry of a restitution order of \$60,000.00, "the agreed amount of loss to the government from his criminal conduct." The agreement stated that it did not bind any federal state or local prosecuting authority other than the U.S. Attorney's Office.

By decision dated March 30, 2009, OWCP terminated compensation for wage loss effective July 30, 2008. It found that appellant pleaded guilty to fraud in the application of FECA benefits and was no longer entitled to wage-loss compensation.

By decision dated May 13, 2009, OWCP determined that appellant had forfeited compensation from March 22, 1992 to February 20, 2009. It found that he had failed to report earnings as required by the CA-1032 forms.

On May 13, 2009 OWCP made a preliminary determination that an overpayment of \$402,159.58 had occurred. It calculated that this represented all compensation from March 22, 1992 to February 20, 2009, excluding the following periods: June 7, 1996 to April 16, 1997, July 18, 1998 to May 29, 1999 and July 14 to November 19, 2007. According to OWCP the excluded periods were not covered by signed CA-1032 forms. With regard to waiver, it found that appellant was at fault in creating the overpayment and was not entitled to waiver. Deducting the court ordered restitution of \$60,000.00, the overpayment amount was \$342,159.58.

By letter dated June 10, 2009, appellant requested a hearing on the overpayment issues. On August 17, 2009 he requested reconsideration of the March 30, 2009 OWCP decision. A hearing before an OWCP hearing representative was held on August 31, 2009 on the issues raised in the March 30 and May 13, 2009 decisions, as well as preliminary overpayment determination.

In a decision dated November 23, 2009, the hearing representative amended the forfeiture decision. The hearing representative found that there was no forfeiture of compensation based on the February 20, 2009 CA-1032 forms, as there was no evidence appellant operated his charter boat business during the 15 months covered by the form. The amount of the overpayment was reduced to \$303,724.66. The hearing representative denied waiver as appellant was at fault in creating the overpayment. In addition, the hearing representative affirmed the termination of compensation for wage loss.

By decision dated May 18, 2010, OWCP's Branch of Hearings and Review stated that the November 23, 2009 decision was issued prematurely and was being vacated. In a decision dated June 22, 2010, the hearing representative indicated that this decision was superseding the November 23, 2009 decision. The findings with respect to forfeiture, overpayment, waiver and termination of compensation remained the same as in the November 23, 2009 decision.<sup>2</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section § 8106(b) of FECA provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment pr[e] self-employment, by affidavit or otherwise, in the manner and at times the Secretary specifies.... An employee who--

- (1) fails to make an affidavit or report when required; or
- (2) knowingly omits or understates any part of his earnings;

---

<sup>2</sup> The November 23, 2009 decision had compromised the principal of the overpayment based on the interest rate on debts owed to the government.

forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered ... under section 8129 of this title, unless recovery is waived under that section.”<sup>3</sup>

Before OWCP can declare a forfeiture of compensation, it must establish that appellant has received earnings from his own employment, not from passive investment in business ventures.<sup>4</sup> An individual can be subjected to the forfeiture provision of 5 U.S.C. § 8106(b) if he or she knowingly failed to report employment or earnings. The term knowingly, as defined in OWCP’s implementing regulations, means with knowledge, consciously, willfully or intentionally.<sup>5</sup> OWCP has the burden of proof to establish that a claimant knowingly omitted or understated earnings.<sup>6</sup> To meet this burden, it is required to examine closely appellant’s activities and statements. OWCP may meet this burden without an admission by the claimant if the circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.<sup>7</sup>

Section 10.5(g) of OWCP’s regulations defines earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits nor the characterization of the duties as a hobby, removes an unremunerated individual’s responsibility to report the estimated cost to have someone else perform his or her duties.”

### **ANALYSIS -- ISSUE 1**

OWCP found that appellant had forfeited compensation based on the failure to disclose employment activity on the CA-1032 forms he submitted. The period covered by each form is 15 months and the form advises a claimant to report all employment activity for which any salary wages or income were received, as well as any self-employment or involvement in a business enterprise, even if he was not paid. The evidence from the Maryland Department of Natural Resources indicates that commencing May 1, 1993 appellant had bookings in a charter fishing business under his license number, with bookings in each year except 1995 and 2003. According

---

<sup>3</sup> 5 U.S.C. § 8106(b).

<sup>4</sup> *Anthony V. Knox*, 50 ECAB 402 (1999).

<sup>5</sup> 20 C.F.R. § 10.5(n).

<sup>6</sup> *See F.H.*, Docket No. 07-1379 (issued November 24, 2008).

<sup>7</sup> *Terry A. Geer*, 51 ECAB 168 (1999).

to a July 30, 2007 interview from the OIG report, he indicated that he did engage in charter fishing activity through the “early summer” of 2006. Although appellant submitted a document asserting there was no activity in 1999 and 2004, the bookings from the Maryland Department of Natural Resources show activity in both those years.

On the following CA-1032 forms appellant did not report any employment activity in a fishing charter business: June 22, 1993, June 28, 1994, August 2, 1995, June 6, 1996, July 17, 1998, August 30, 2000, August 16, 2001, August 3, 2002, August 12, 2003, July 24, 2004, September 21, 2005, August 2, 2006 and July 13, 2007. For the 15-month period covered by each of these forms, the evidence of record shows some employment activity with respect to a fishing charter enterprise. The booking information from Maryland shows bookings in each of the 15-month periods except for July 13, 2007. But in this regard the Board notes that appellant acknowledged to the OIG investigators that he continued to operate the charter business until early summer 2006. Since the period covered by the July 13, 2007 CA-1032 form commenced April 13, 2006, the evidence supports a finding that there was employment activity during the period covered by the July 13, 2007 CA-1032 form.

The evidence from the OIG investigative report establishes that appellant charged fees to clients for his fishing charter services. Appellant also submitted documents acknowledging that he received earnings from his fishing charter activity. According to appellant’s representative, such earnings were *de minimus* and therefore did not have to be reported to OWCP. But appellant submitted a handwritten document noting earnings of more than \$6,000.00 in 1998, 2001 and 2002. The OIG report noted that he charged significant fees for each charter fishing booking. The Board has held that a claimant must report any remuneration from such activity as the occasional sales of dogs by a breeder or remuneration such as free housing or living expenses.<sup>8</sup> There evidence does not establish the earnings in this case were of a *de minimus* nature or that no reporting was required.

The Board finds that the evidence establishes that appellant omitted earnings on the above-dated CA-1032 forms. The next question is whether the omission was “knowingly” made. The CA-1032 form has clear and explicit language regarding the necessity to report any earnings, as well as a strongly worded certification clause regarding the truth of the statements offered.<sup>9</sup> The OIG report indicated that appellant had acknowledged that he failed to truthfully report his employment activity. The plea agreement that he signed on June 12, 2008 refers to the September 21, 2005 CA-1032 form as “one example” of a false submission that appellant “knowingly and willingly” executed. Appellant’s representative has argued that appellant suffered from a diminished mental concentration which may have affected his ability to comprehend the requirements of the CA-1032 form. There is, however, no probative supporting evidence. A report dated January 8, 2010 from Dr. Joseph Marnell, a psychiatrist, stated that appellant had struggled with depression and agitation since the employment injury. But he did not indicate that appellant would have difficulty understanding the obligation to report earnings as clearly stated on the CA-1032 forms he signed from 1993 to 2007. The record indicates that appellant qualified for a fishing charter license and continued to have the mental capacity to meet

---

<sup>8</sup> See also *James M. Steck*, 49 ECAB 134 (1997); see *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>9</sup> See *T.L.*, Docket No. 10-2141 (issued July 1, 2011).

the license renewal requirements. The plea agreement notes that he reported to the U.S. Coast Guard that he was in good health with no medical restrictions or limitations. As noted, the Board looks at the circumstances of the particular case on the issue of a knowing omission of earnings. Based on the evidence of record, the Board finds that appellant knowingly omitted earnings. Pursuant to 5 U.S.C. § 8106(b), his compensation is forfeited for any period covered by the CA-1032 forms.

On appeal, appellant states that the applicable statute is 5 U.S.C. § 8105, rather than 5 U.S.C. § 8106, contending section 8105 applies to employees who are totally disabled, while section 8106 applies to partial disability only. The Board has considered this argument in prior decisions. As the Board noted in *Sherwood T. Rodrigues*,<sup>10</sup> the construction of 5 U.S.C. § 8106(b) to include total disability is appropriate. The inclusion of section 8106(b) under a heading of partial disability is simply a recognition that normally an employee that was totally disabled would not have any employment earnings to report and therefore a provision regarding such earnings would be meaningless. The Board finds that 5 U.S.C. § 8106(b) is applicable in this case.

The Board finds that OWCP properly determined that appellant forfeited compensation for the 15-month periods covered by the CA-1032 forms signed on June 22, 1993, June 28, 1994, August 2, 1995, June 6, 1996, July 17, 1998, August 30, 2000, August 16, 2001, August 3, 2002, August 12, 2003, July 24, 2004, September 21, 2005, August 2, 2006 and July 13, 2007. It is noted that the forms do not cover the periods June 7, 1996 to April 16, 1997 and July 18, 1998 to May 29, 1999.

### **LEGAL PRECEDENT -- ISSUE 2**

If a claimant has any earnings during a period covered by a Form CA-1032 which he knowingly fails to report, he is not entitled to compensation for any portion of the period covered by the report.<sup>11</sup> Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

The period of the forfeiture in this case, as noted above, was March 22, 1992 through July 13, 2007 (excluding the periods June 7, 1996 to April 16, 1997 and July 18, 1998 to May 29, 1999). OWCP originally determined that the overpayment was \$402,149.58, which included compensation paid from November 20, 2007 to February 20, 2009. The amount was reduced by \$60,000.00 based on the plea agreement with the U.S. Attorney's office. Since the hearing representative found that compensation of \$38,424.92 paid for the period November 20, 2007 to February 20, 2009 was not included in the overpayment, the amount was reduced to

---

<sup>10</sup> 37 ECAB 617 (1986).

<sup>11</sup> *Cheryl Thomas*, 55 ECAB 610, 617 (2004); *Louis P. McKenna, Jr.*, 46 ECAB 328 (1994).

<sup>12</sup> 20 C.F.R. § 10.529(b).

\$303,724.66. Based on the evidence of record, this represents the compensation paid during the forfeiture period.

Appellant argues that the plea agreement signed by him on June 12, 2008, which obligated him to pay \$60,000.00 with respect to the criminal action brought by the U.S. Attorney's Office, is a global settlement that represents the entire amount owed to the U.S. OWCP procedures recognize that a court order stating the restitution amount "will be in full satisfaction of the debt owed to the United States (a 'Global Settlement')" will take precedence over OWCP debt collection process.<sup>13</sup> But in this case the agreement does not provide explicit language stating that the restitution was in full satisfaction of the debt owed to the United States. The agreement states that it does not bind federal, state or local prosecuting authority other than the U.S. Attorney's Office.<sup>14</sup> In the absence of clear and specific language that, the plea agreement was intended to be a global settlement, the Board finds that the overpayment amount is \$303,724.66.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(b) of FECA<sup>15</sup> provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience."<sup>16</sup> Waiver of an overpayment is not permitted unless the claimant is "without fault" in creating the overpayment.<sup>17</sup>

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: "(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect."

### **ANALYSIS -- ISSUE 3**

In the present case, appellant was at fault under the third standard noted above as he accepted payments he knew or should have known were incorrect. He had received and signed the CA-1032 forms which advised him that the information requested was necessary to determine whether he was entitled to continuing compensation benefits or whether his benefits should be adjusted. Appellant had been advised on June 14, 1991, when his claim was accepted,

---

<sup>13</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.18 (May 2004).

<sup>14</sup> See *Joan Ross* 57 ECAB 694 (2006).

<sup>15</sup> *Supra* note 1.

<sup>16</sup> 5 U.S.C. § 8129(b).

<sup>17</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

that he was not entitled to receive compensation during a period he had worked and must return any payment covering a period during which he had worked.

The Board has found that appellant knowingly omitted earnings on the CA-1032 forms. Appellant therefore knew or should have known that the compensation payments he received should have been adjusted and were incorrect. Since he was at fault in creating the overpayment, he is not entitled to waiver.

#### **LEGAL PRECEDENT -- ISSUE 4**

Section 8148 of FECA, states, in part:

“(a) Any individual convicted of a violation of section 1920 of Title 18 or any other Federal or State criminal statute relating to fraud in the application for or a receipt of any benefit under [FECA], shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under [FECA] for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.”

Section 10.17 of the implementing federal regulations provide, as follows:

“When a beneficiary either pleads guilty to or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary’s entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial.”<sup>18</sup>

OWCP procedures require that, to support termination or suspension of benefits under 5 U.S.C. § 8148 the case record must contain: a copy of the indictment or information; a copy of the plea agreement, if any; a copy of the document containing a guilty verdict; and/or a copy of the court’s docket sheet. Further, this evidence must establish: (1) the individual was convicted; and (2) the conviction is related to the claim for or receipt of benefits under FECA.<sup>19</sup> The effective date of termination in fraud cases under section 8148(a) is the date of conviction, which is the date the guilty plea is accepted or a verdict of guilty is returned after trial.<sup>20</sup> Due to the nature of a termination involving fraud, no pretermination notice is required before issuing a final decision.<sup>21</sup>

---

<sup>18</sup> 20 C.F.R. § 10.17.

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1440.12(d) (March 1997).

<sup>20</sup> 20 C.F.R. § 10.17.

<sup>21</sup> *Jorge E. Sotomayer*, 52 ECAB 105 (2000).



#### **ANALYSIS -- ISSUE 4**

The evidence in this case establishes that appellant was charged with violating 18 U.S.C. § 1920 regarding false statements to obtain compensation benefits. The guilty plea to one count of violating the statute was accepted by the U.S. District Court on July 30, 2008. Pursuant to 5 U.S.C. § 8148 and 20 C.F.R. § 10.17, appellant is not entitled to further compensation after that date. The Board accordingly finds that OWCP properly terminated compensation effective July 30, 2008.

#### **CONCLUSION**

The Board finds that OWCP properly found appellant forfeited his compensation for the period March 22, 1992 through July 13, 2007 (excluding the periods June 7, 1996 to April 16, 1997 and July 18, 1998 to May 29, 1999), an overpayment of \$303,724.66 was created, OWCP properly denied waiver of the overpayment and OWCP met its burden of proof to terminate compensation effective July 30, 2008.

#### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 22, 2010 is affirmed.

Issued: May 22, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board